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80-6039

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1981

UNITED STATES OF AMERICA,
Respondent

v.

ROBERT LEE GREEN,
a/k/a/ HOPE,
Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE
FOURTH CIRCUIT, UNITED STATES COURT OF APPEALS

Leslie L. Gladstone
Suite 400
One East Redwood Street
Baltimore, Maryland 21202
(301) 539-0605

LESLIE L. GLADSTONE
ATTORNEY AT LAW
ONE EAST REDWOOD ST.
SUITE 400
BALTIMORE, MD. 21202
(301) 539-0605
(301) 727-2322

QUESTION PRESENTED FOR REVIEW

Did the Lower Court Err in Denying the Defendant's Motion to Dismiss Based on the United States Constitution Fifth Amendment Prohibition Against Double Jeopardy?

Table of Contents

	Page
Question Presented for Review	1
Table of Contents	1
Table of Authorities	1
Citation to Opinion Below	2
Jurisdiction	3
Constitutional Provisions and Statutes	3
Statement of the Case	5
Reasons for Granting the Writ	7
Conclusion	10
Appendix	

Table of Authorities

Cases

Divans v. California, 434 U.S. 1303 (1977) . . . 10

United States v. Dinitz, 424 U. S. 600 (1976) 7, 8, 9

United States v. Jorn, 400 U. S. 470 (1971) . . 7

United States v. Kessler, 530 F.2d 1246 (5th Cir. 1976) 9

United States v. Nelson, 582 F.2d 1246 (10th Cir. 1978), cert. denied, 439 U.S. 1079 (1979) 9

LESLIE L. GLADSTONE
ATTORNEY AT LAW
ONE EAST REDWOOD ST.
SUITE 400
BALTIMORE, MD. 21202
(301) 539-0606
(301) 727-2322

Statutes

	Page
18 U.S.C. §2	3, 4, 5
21 U.S.C. §846	3, 4, 5
28 U.S.C. §1254	3, 4
Other	
United States Constitution, Fifth Amendment . .	3, 4

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ROBERT LEE GREEN,
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PETITION FOR WRIT OF CERTIORARI TO THE
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Petitioner requests that a Writ of Certiorari issue to review the judgment of the Fourth Circuit, United States Court of Appeals, on December 18, 1980.

CITATION TO OPINION BELOW

The Opinion of the Fourth Circuit, United States Court of Appeals, is reported at _____ F.2d _____, No. 79-5124.

ESLIE L. GLADSTONE
TTORNEY AT LAW
NE EAST REDWOOD ST
UITE 400
ALTIMORE, MD. 21202
01) 539-0605
01) 727-3322

JURISDICTION

Petitioner was indicted by a Federal Grand Jury for the District of Maryland on November 8, 1978 charging Petitioner, among others, with violation of 21 U.S.C. §846, Conspiracy to Distribute Heroin, and 18 U.S.C. §2, Aiding and Abetting. Petitioner pled not guilty and trial commenced before Judge James R. Miller, Jr. and a jury on March 12, 1979. A mistrial was declared as against Petitioner only on March 14, 1979.

On April 2, 1979, Petitioner filed a Motion to Dismiss on the grounds of double jeopardy. On April 5, 1979, a hearing was held on the Motion to Dismiss and an Order was entered that same date denying the Motion.

An appeal to the Fourth Circuit, United States Court of Appeals, was filed on April 5, 1979. The case was argued before Chief Judge Clement F. Haynsworth, Jr. and Circuit Judges Harrison L. Winter and Francis D. Murnaghan, Jr. A published written Opinion unfavorable to Petitioner, Judge Winter dissenting, was handed down on December 18, 1980.

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. §1254(1), the case having been decided by the Fourth Circuit, United States Court of Appeals.

CONSTITUTIONAL PROVISIONS AND STATUTES

U. S. CONST. Amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the

LESLIE L. GLADSTONE
ATTORNEY AT LAW
ONE EAST REDWOOD ST.
SUITE 400
BALTIMORE, MD. 21202
(301) 539-0808
(301) 727-2322

Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. §2:

Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

21 U.S.C. §846:

Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

28 U.S.C. §1254(1):

Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

LESLIE L. GLADSTONE
ATTORNEY AT LAW
ONE EAST REDWOOD ST
SUITE 400
BALTIMORE, MD. 21202
(301) 539-0606
(301) 727-2322

STATEMENT OF THE CASE

On November 8, 1978, a Federal Grand Jury for the District of Maryland returned a 21-Count Indictment charging, among others, the Petitioner, Robert Lee Green, A/K/A Hope, with violation of 21 U.S.C. §846, Conspiracy to Distribute Heroin, and 18 U.S.C. §2, Aiding and Abetting. Petitioner pled not guilty on November 20, 1978, and trial commenced before Judge James R. Miller, Jr. and a jury on March 12, 1979.

The entire case of the Government was based upon the testimony (and thus the veracity) of the accomplice-witnesses of the alleged conspiracy because no drugs were ever recovered from the Petitioner, nor was he observed by police or Drug Enforcement Administration agents in the possession of heroin.

Special Agent Robert L. Dixon, a four-year veteran of DEA, was the last witness to testify. Agent Dixon, who had been present at counsel table during the entire trial, had impressive credentials as a Metropolitan Police Department Officer in Washington, D. C. for five and one-half years before joining DEA. He had received many special certificates of training, had attended basic agents schools with DEA and had recently completed training at the DEA school for advanced agents. He had an Associate Degree in the Administration of Justice with a minor in Corrections. Since joining DEA he had nade over 150 arrests and participated in approximately 35 cases.

Agent Dixon testified, inter alia, that heroin dealers will utilize drug users as street distributors. The Government's earlier evidence had attempted to depict Petitioner as a street distributor.

LESLIE L. GLADSTONE
ATTORNEY AT LAW
ONE EAST REDWOOD ST.
SUITE 400
BALTIMORE, MD. 21202
(301) 539-0808
(301) 727-3533

During the cross-examination of Agent Dixon, inquiry was made to the DEA Form 202 filled out upon the arrest of Petitioner regarding his drug use. The DEA Form 202 revealed that Petitioner was indeed a heavy heroin user. It is procedure for the processing agent upon arrest to examine the arms and body of the arrestee. After denying that he personally arrested Petitioner, Agent Dixon was simply asked to locate the DEA form and advise of the name of the arresting officer from that record. After a review of the DEA file at counsel table and consulting with the prosecutor for several minutes, his response to that very limited question was, "Mr. Green was processed by myself at the U. S. Marshal's office. At the time he was arrested, I believe, by Special Agent McCormack. He was currently incarcerated for armed robbery."

A mistrial was thereupon declared upon Motion of the Petitioner, on March 14, 1979, it having been made abundantly clear to the Government earlier at trial that the Petitioner would not take the witness stand because of his prior record and its impeachment potential along with possible prejudice to his case.

An appeal to the Fourth Circuit, United States Court of Appeals, was filed on April 5, 1979. The case was argued before Chief Judge Clement F. Haynsworth, Jr. and Circuit Judges Harrison L. Winter and Francis D. Murnaghan, Jr. A published written Opinion unfavorable to Petitioner (Judge Winter dissenting) was decided on December 18, 1980.

LESLIE L. GLADSTONE
ATTORNEY AT LAW
ONE EAST REDWOOD ST
SUITE 400
BALTIMORE, MD. 21202
(301) 539-0808
(301) 727-2322

REASONS FOR GRANTING THE WRIT

The Federal District Court and the Fourth Circuit, United States Court of Appeals were in error in denying and upholding the denial, respectively, of Petitioner's Motion to Dismiss, based upon the United States Constitution Fifth Amendment prohibition against double jeopardy.

It is settled that where a defendant was deliberately provoked into requesting a mistrial, then the Double Jeopardy Clause prevents a retrial. It is also established that when a defendant has successfully requested a mistrial because of simple judicial or prosecutorial error, the Double Jeopardy Clause is no bar to his retrial. See, United States v. Dinitz, 424 U.S. 600 (1976). However, it is not settled how the above rules are to be applied where there is more than mere judicial or prosecutorial error but less than a deliberate attempt by the Government to provoke a mistrial.

As indicated by Judge Winter, dissenting, in the case sub judice, there is a division of authority over whether Dinitz forbids re-prosecution when a mistrial is caused by governmental bad-faith conduct short of an intention to cause a mistrial, or whether it merely forbids re-prosecution when the object of the misconduct was to cause a mistrial.

The Dinitz opinion discussed the underlying considerations of the Double Jeopardy Clause where a defendant requested and was granted a mistrial. In quoting from United States v. Jorn, 400 U. S. 470, 485 (1971)(including original n. 12 omitted in Dinitz), the Dinitz opinion indicated:

LESLIE L. GLADSTONE
ATTORNEY AT LAW
ONE EAST REDWOOD ST
SUITE 400
BALTIMORE, MD. 21202
(301) 539-0808
(301) 727-2322

> If that right to go to a particular tribunal is valued, it is because, independent of the threat of bad-faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial. Thus, where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error.[12]
>
> [12]Conversely, where a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal, reprosecution might well be barred. Cf. United States v. Tateo [377 U.S. 463, 468 n.3, 84 S.Ct. 1587, at 1590, 12 L.Ed.2d 448 (1964)]

Dinitz went on to state:

> [I]t is evident that when * * * prosecutorial error seriously prejudices a defendant, he may have little interest in completing the trial and obtaining a verdict from the first jury. The defendant may reasonably conclude that a continuation of the tainted proceeding would result in a conviction followed by a lengthy appeal and, if a reversal is secured, by a second prosecution. In such circumstances, a defendant's mistrial request has objectives not unlike the interests served by the Double Jeopardy Clause--the avoidance of the anxiety, expense, and delay occasioned by multiple prosecutions.
>
> * * * * * *
>
> It [the Double Jeopardy Clause] bars retrials where "bad-faith conduct by the judge or prosecutor" threatens the "[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict" the defendant.

United States v. Dinitz, 424 U.S. at 608-12

LESLIE L. GLADSTONE
ATTORNEY AT LAW
ONE EAST REDWOOD ST
SUITE 400
BALTIMORE, MD. 21202
(301) 539-0808
(301) 727-2322

The Fifth Circuit, in United States v. Kessler, 530 F.2d 1246 (5th Cir. 1976), has given liberal interpretation to the above language in Dinitz. In Kessler, the prosecution intentionally introduced a prejudicial false exhibit, and the defendant successfully moved for mistrial. The court acknowledged that under Dinitz retrial was normally permissible when trial ends on the defendant's motion. But the court found that "[w]here 'prosecutorial overreaching' is present, the interests protected by the Double Jeopardy Clause outweigh the public interest in conducting a second trial ending in acquittal or conviction." Id. at 1255-56. The court continued: "To find 'prosecutorial overreaching,' the Government must have, through 'gross negligence or intentional misconduct,' caused aggravated circumstances to develop which 'seriously prejudice[d] a defendant' causing him to 'reasonably conclude that a continuation of the tainted proceeding would result in a conviction.'" Id. at 1256. Based on this double jeopardy analysis, the court held that the Double Jeopardy Clause forbade the defendant's retrial, even though he had moved for mistrial.

The Tenth Circuit, by contrast, has narrowly interpreted the language of Dinitz. In United States v. Nelson, 582 F.2d 1246 (10th Cir. 1978), cert. denied, 439 U.S. 1079 (1979), the prosecutor intentionally induced a DEA agent to testify that the defendant was a "major trafficker" in drugs, and the defendant moved for a mistrial which was granted. The district judge characterized the testimony as being as "reprehensible as any he had ever heard." Id. at 1248. Nevertheless, the Tenth Circuit held that the Double Jeopardy Clause did not bar retrial.

LESLIE L. GLADSTONE
ATTORNEY AT LAW
ONE EAST REDWOOD ST.
SUITE 400
BALTIMORE, MD. 21202
(301) 539-0906
(301) 727-2322

The court followed an opinion by Mr. Justice Rehnquist sitting as a circuit justice in which the Justice permitted retrial where the defendant failed to show that the trial mistake "was committed by the prosecution or by the court for the purpose of forcing the defendant to move for a mistrial." Id. at 1249 (quoting Divans v. California, 434 U. S. 1303 (1977)). The Tenth Circuit concluded that the defendant must show that "the objectionable testimony . . . was the product of a governmental scheme intentionally calculated to trigger the declaration of a mistrial." 582 F.2d at 1249. Finding no such proof, the court saw no constitutional bar to the defendant's second trial.

CONCLUSION

As indicated by the above cases, considerable confusion as to whether Dinitz forbids reprosecution when a mistrial is caused by governmental bad-faith conduct short of an intention to cause a mistrial or whether it merely forbids reprosecution when the object of the misconduct was to cause a mistrial, has caused a split to develop between the Federal Circuits. Hence, a federal criminal defendant may be treated differently under the Double Jeopardy Clause, depending upon the Federal Circuit in which he is tried.

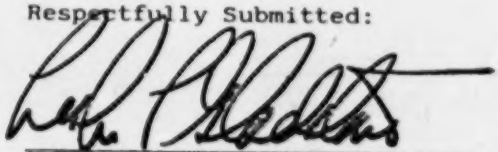
In the case sub judice, Agent Dixon was functionally little different from the prosecutor. He was closely intertwined with the prosecution: he processed Petitioner when he was arrested, arrested the leaders of the heroin ring, and, with his intimate knowledge of the case, was the agent who sat at counsel table and assisted in the trial of the case. In short, Agent Dixon, a highly-trained and experienced DEA agent, played a principal role in the prosecution and was functionally the same as the prosecutor.

LESLIE L. GLADSTONE
ATTORNEY AT LAW
ONE EAST REDWOOD ST.
SUITE 400
BALTIMORE, MD. 21202
(301) 539-0606
(301) 727-2322

Agent Dixon's malicious attempt to harm the Petitioner by making his prejudicial statement was found by the trial judge to be less than the "intent" to cause a mistrial that one line of authority holds to be necessary to prevent re-trial under the Double Jeopardy Clause. But it is clear that Agent Dixon's statement, in light of his experience and in light of the favorable direction in which trial was proceeding for the Petitioner, was "prosecutorial overreaching" which should be a bar to retrial under the Double Jeopardy Clause. The proper determination of the question in issue requires that the Supreme Court of the United States authoritatively heal the split between the Circuits.

Wherefore, Petitioner requests that the Supreme Court of the United States issue a Writ of Certiorari to the Fourth Circuit, United States Court of Appeals to review the decision of that court in this matter.

Respectfully Submitted:



Leslie L. Gladstone

LESLIE L. GLADSTONE
ATTORNEY AT LAW
ONE EAST REDWOOD ST
SUITE 409
BALTIMORE, MD. 21202
(301) 539-0808
(301) 727-3522

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 79-5124

United States of America,

Appellee,

v.

Robert Lee Green,
a/k/a Hope

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. James R. Miller, Jr., District Judge.

Argued August 27, 1980 Decided December 18, 1980

Before HAYNSWORTH, Chief Judge; WINTER and MURNAGHAN, Circuit Judges.

Leslie L. Gladstone for Appellant; Glenn L. Cook, Assistant United States Attorney (Russell T. Baker, Jr., United States Attorney on brief) for Appellee.

MURNAGHAN, Circuit Judge:

Robert Lee Green was charged with conspiracy to distribute heroin. 21 U.S.C. § 846.

At a jury trial of Green and two others, United States Special Agent Robert Dixon testified about the alleged conspiracy. Dixon had been working for four years for the Drug Enforcement Agency. Prior to that he was, for five years, a police officer in Washington, D. C. Defense counsel adroitly asked Dixon whether, at Green's arrest, his arms then exhibited the puncture marks frequently found on heroin users.[1] Dixon stated that he could not remember the name of the arresting officer.[2]

With that answer by Dixon, the cross-examination took on an added aspect favorable to the defendant, since a truly informational response was going to make Dixon look as though he either possessed a very poor memory or was disingenuous. Dixon,

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1 The objective of defendant's counsel was to show addiction, and hence personal use, as refutation of the contention that Green was a distributor. Testimony previously elicited from Dixon arguably supplied support for such a defense approach.

2 In answer to a question by the Court Dixon had responded that he, himself, had no knowledge "whether or not the arms or body of Mr. Green were examined when he was arrested."

after examining the relevant government form, augmented his answer:

> Mr. Green was processed by myself at the U.S. Marshall's office. At the time he was arrested, I believe, by Special Agent McCormack. He was currently incarcerated for armed robbery. (Emphasis added.)

It is elementary, of course, that customarily reference to another, independent conviction of a defendant is altogether improper.[3] It can hardly be doubted that the impropriety was something of which an experienced United States Special Agent was aware. Green moved for and quite correctly was granted a mistrial.

Now Green is before us appealing from a denial of his motion to dismiss on grounds of double jeopardy. The district judge who had presided at the trial in which the mistrial was granted to Green[4] concluded:

> All right. The Court is satisfied that Agent Dixon was not the individual who is in charge of the case, that this was not a tactic that was planned ahead of time by the Government, that this was a spur of the moment

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3 E.g., United States v. Johnson, 610 F.2d 194, 196 (1979).

The government asserts no basis justifying a departure from the customary rule in Green's case. Indeed it characterized as "the proper remedy" the trial judge's grant of a mistrial because of the Dixon statement.

4 The case continued as to the codefendants, who were found guilty.

> statement. Unfortunate, it is true, but via the agent. I think that he, personally, frankly -- I think that although he intended to make a statement, and he probably intended it to have an effect on the Jury, he did not realize what effect it was really going to have and that was to end the case at that point against Mr. Green. He was agitated by the effective cross examination that was being conducted against him on this point of whether or not he had actually filled out the form, and he lost his cool, so to speak, and spilled the beans, and in doing so, resulting in a mistrial. But I do not believe it is a situation in which justice would be served by ending all prosecution. I do not believe it would be a violation of the double jeopardy clause to require the trial to commence again.

When a mistrial is declared without the defendant's request or consent, a new trial may be held, without violating the Double Jeopardy Clause, only if there was a manifest necessity for the mistrial or the ends of public justice would otherwise be defeated. United States v. Dinitz, 424 U.S. 600, 606-07 (1976). However, when a mistrial is declared at the defendant's request, the considerations are different. Id. at 607. In such a situation, in the absence of prosecutorial or judicial overreaching or misconduct, "'a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial[5] error.'" Id. quoting from United States v. Jorn, 400 U.S. 470,

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5 Green makes no assertion of misconduct by the district judge.

485 (1971). Nevertheless, as stated in Dinitz, the request by the defendant for a mistrial does not eliminate all possibility of a double jeopardy bar. Where the prosecutorial error was designed to lead the defendant into moving for a mistrial, there may not be a reprosecution:

> The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where 'bad-faith conduct by judge or prosecutor' . . . threatens the '[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant.

Id. at 611.

The issue whether the prosecution deliberately provoked a mistrial becomes one for the district judge to resolve, and his determination will not be disturbed if supported by the record. United States v. Gamble, 607 F.2d 820, 823 (9th Cir. 1979), cert. denied, 100 S.Ct. 1059, rehearing denied, 100 S.Ct. 1609 (1980).

The Fifth Circuit interprets the bad faith necessary to constitute the Double Jeopardy Clause a bar to further prosecution as confined to "grossly negligent or intentional misconduct that seriously prejudices the defendant." United States v. Davis, 589 F.2d 904, 906 (5th Cir. 1979), cert. denied, 441 U.S. 950 (1979). A trial court's determination that the judge's or prosecutor's action was not conducted in bad faith will not be set aside unless

the reference to Green's conviction for armed robbery lacks the appearance of a scheme to secure abortion of the present trial and retrial in circumstances presumably more favorable to the prosecution.

While not controlling on the question by any means, the absence of a prosecutorial desire for a mistrial is rendered somewhat more credible by

(1) the United States Attorney's attempt to have the district judge curatively instruct the jury to disregard Dixon's impropriety, in lieu of a mistrial;

(2) the fact that the jury proceeded to convict the two codefendants of conspiracy to distribute heroin.

Another question of some relevance is whether Special Agent Dixon is to be included within the term "prosecutor" for the purpose of those rules. Obviously, it is in the interests of the United States Attorney to use all reasonable steps to prevent such an occurrence as took place here. However, there is no indication of the slightest kind that this was other than a spontaneous "blurting out" by the agent in no way planned, anticipated, or condoned by the United States Attorney.[8] We, of

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8 The Assistant United States Attorney said: "I was just as surprised as anyone else when the statement came out." Defense counsel stated that he did not suggest that the United States Attorney told Dixon to make the improper and unresponsive remark.

course, hold the United States Attorney to high standards of conduct for he, as well as the courts, has a direct responsibility to insure not only that actual justice be done but that the appearance of justice as well be rigidly guaranteed.

However, it would be too simplistic to reach out and ensnare within the term "prosecutor" every federal agent involved in a criminal matter, including those involved in the collection of evidence and the preparation for trial, although control of the prosecution is strictly in the hands of others, i.e., members of the office of the United States Attorney. In this connection, it is perhaps not amiss to remind ourselves that other interests than those of the defendant are involved. His interests must be scrupulously observed and protected. Nevertheless, the public interest in the prevention, punishment, and deterrence of crime cannot be totally ignored. The defendant's inconvenience in having to face a second trial weighed in the circumstances of this case against a total denial to the public of a right to have the issue of defendant's guilt or innocence litigated does not suffice to invoke the double jeopardy protections of the Fifth Amendment.

> Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute

reversible error in the proceedings leading to conviction."

United States v. Tateo, 377 U.S. 463, 466 (1964).[9]

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9 The strongest thrust of Green's argument derives from the fact that, viewed from his perspective alone, the impact on him of the Dixon statement was equally injurious, whether it was cunningly contrived to force a defendant's demand for a retrial, or, as the district judge found, it was a spur-of-the-moment expression with no such evil motive. "What difference," the defendant may be expected to ask, "what he thought? It's what he did that hurt!"

Yet motivation frequently makes a difference, and it matters here. The invocation of the double jeopardy principle to bar retrial is the application of a strong sanction deemed necessary effectively to discourage despicable prosecutorial behavior such as a planned below-the-belt punch to force a defendant to seek mistrial. Where the underlying cause of the error is less serious, less likely to be aped in other prosecutions, different considerations have to be allowed sway. Green is a member of a large class of persons: those prosecuted for criminal offenses. If double jeopardy were extended to a case like his, where there was no attempt to achieve a defendant-requested mistrial, the class as a whole, though not Green individually, of course, could be expected to suffer.

> From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest.

United States v. Tateo, supra, 377 U.S. at 466.

We have already quoted the Supreme Court's opinion in United States v. Dinitz, 424 U.S. 600, 611 (1976):

> The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions.

However, when the prosecutor or the judge acts erroneously but without such a malevolent purpose,[10] retrial is not precluded even though the error was such as to present the defendant with a "'Hobson's choice' between giving up his first jury and continuing a trial tainted by prejudicial judicial or prosecutorial error." Id. at 609.[11]

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10 In this essential respect, the present case is fundamentally distinguishable from cases where a mistrial was rendered necessary by purposeful prosecutorial activity, as for example United States v. Kessler, 530 F.2d 1246, 1257 (5th Cir. 1976) (". . . intentional misconduct by the Government regarding the AR-180, a known false exhibit, which caused serious prejudice to the defendants' rights to a fair jury trial.")

11 Cf. Divans v. California, 434 U.S. 1303 (1977) (denial of stay by Justice Rehnquist):

> Any order granting a mistrial at the behest of a defendant in a criminal case is typically based upon error or misconduct on the part of other counsel or the court. In order to elevate such a typical order into one which could form the basis of a claim of double jeopardy, it must be shown not only that there was error, which is the common predicate to all such orders, but that such error was committed by the prosecution or by the court for the purpose of forcing the defendant to move for a mistrial.

We have concluded that there was adequate support in the record for the finding by the district judge that there was no judicial or prosecutorial intention to provoke a mistrial request.

Accordingly, we affirm.

AFFIRMED.

WINTER, Circuit Judge, dissenting:

I respectfully dissent.

The majority and I are in substantial agreement as to the basic rules which govern the outcome of this case: Ordinarily when a defendant has successfully requested a mistrial because of judicial or prosecutorial error, the Double Jeopardy Clause is no bar to his retrial. But if a defendant was deliberately provoked into requesting a mistrial, then the Double Jeopardy Clause prevents a retrial. See, United States v. Dinitz, 424 U.S. 600 (1976); Holleman, Mistrials and the Double Jeopardy Clause, 14 Ga. L. Rev. 45 (1979). We differ, however, in how those rules are to be applied where, as in this case, there is more than mere judicial or prosecutorial error but less than a deliberate attempt by the government to provoke a mistrial. I think that, because defendant was the victim of deliberate misconduct on the part of a government agent who occupied a principal role in defendant's initial prosecution, and because this misconduct provoked defendant's successful motion for a mistrial, the Double Jeopardy Clause bars his retrial. To me, the constitution compels this result whether or not the government agent actually intended that a mistrial would result from his misconduct. I would hold that the motion to dismiss the indictment on the ground of double

jeopardy should have been granted.

I.

As I read the district court's findings, they are that Agent Dixon, not by agreement or plan of trial strategy arrived at with the Assistant United States Attorney who was trying the case[1] but on his own motion, intentionally and deliberately brought to the attention of the jury defendant's prior criminal record. The district court also found that Agent Dixon intended his remark to have an effect on the jury. Although a strategy conceived on his own, this was no mere inadvertence or "blurt" as the majority suggests. Indeed, when all of the circumstances are considered, the findings of the district court may well have been charitable; the record gives strong indications that Dixon was deliberately vindictive.

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1. In the colloquy following Dixon's prejudicial statement and defendant's motion for a mistrial, defense counsel stated that Dixon had a brief conversation with the prosecutor when Dixon went to counsel table to examine a record but that counsel did not claim that the prosecutor told Dixon to volunteer the prejudicial information. The prosecutor's response was in effect a denial that he counselled the misconduct.

The district court's finding as to the deliberate character of the volunteered prejudicial testimony and its intended effect to hurt defendant has ample support in the record. Agent Dixon was a four-year veteran of the Drug Enforcement Administration. He had impressive credentials as a Metropolitan Police Department Officer in Washington, D. C., before joining DEA. Since joining DEA he had made over 150 arrests and participated in approximately 35 cases. Manifestly he was the agent in charge of the instant case; he sat at counsel table throughout the entire trial. Significantly, the government had been advised that defendant would not testify because of his record. Undoubtedly, as the agent in charge, Dixon had that knowledge.

When called as the government's last witness, Dixon testified, inter alia, that heroin dealers will not distribute heroin through heavy users. The government's other evidence had depicted defendant as a heroin distributor. Dixon's attention was directed to an entry in a ledger indicating that defendant had received a large amount of drugs for his personal use. Then defendant's attorney began to question Dixon about the DEA form which was filled out when defendant was arrested. It showed that defendant was a heroin

user. That fact had been determined by the DEA agent who processed defendant by the routine examination of defendant's arms for needle marks. Thus, by this point in Dixon's testimony, he had significantly aided the defense: he had said that heavy heroin users would not be used as distributors, that defendant had received a large amount of heroin for his personal use, and that defendant was a user. To discredit Dixon entirely as a witness incriminating defendant, defense counsel asked Dixon if he was the agent who had arrested defendant. Dixon said that he was not. Dixon was then asked to step from the witness chair to counsel table to examine the DEA form to see who signed as the arresting officer. In oral argument, we were told without contradiction that this process took several minutes. When Dixon returned to the stand, he admitted that he had processed defendant at the U.S. Marshal's Office, and he seized on this opportunity to add "He [defendant] was currently incarcerated for armed robbery."[2]

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2. In granting a mistrial, the district court remarked:

> I think that this Agent certainly, with four and a half years with the DEA and five years before that with the Police Force in Washington, D.C., would know that such a statement would be impermissible.

II.

The majority's conclusion that the Double Jeopardy Clause does not proscribe a retrial on these facts rests upon two propositions: (1) Dixon was not a "prosecutor" within the meaning of the Dinitz rule, and (2) there was no finding that Dixon intended to cause a mistrial. I do not think that singly or in combination they support the majority's result.

I cannot read Dinitz as limiting the rule it articulates only to bad-faith conduct by the prosecutor. Dinitz says that "[t]he Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests . . . ." (emphasis added) 424 U.S. at 611. Of course Dinitz also says that "bad-faith conduct by judge or prosecutor" bars retrials, Id. (quoting United States v. Jorn, 400 U.S. 470, 485 (1971)), but I would not read the latter as an exclusive enumeration. In any event, Dixon was functionally little different from the prosecutor in this case. He was closely intertwined with the prosecution: he processed defendant when he was arrested, arrested the leaders of the heroin ring, and, with his intimate knowledge of the case, was the agent who sat at counsel table and assisted in the trial of the case. While I agree that the prosecution should not be tarred with misconduct by every government witness, as, for

example, a witness who is unconnected to the government or even a government agent who played a minor role in the case, it should not be able to escape the consequences of misconduct by one who plays a principal role in the prosecution. In this respect, I think Dinitz fully applicable.

The second purported escape hatch from Dinitz's proscription is more troublesome. I accept as a fact that Dixon's testimony was not a deliberate effort to precipitate a mistrial. Dixon made a malicious attempt to harm defendant; but, the district court found, he intended nothing more.

There is a division of authority over whether Dinitz forbids reprosecution when a mistrial is caused by governmental bad-faith conduct short of an intention to cause a mistrial or whether it merely forbids reprosecution when the object of the misconduct was to cause a mistrial. The Fifth Circuit, in a series of decisions, has interpreted Dinitz as affording liberal protection against retrial in cases of deliberate government misconduct. For instance, in United States v. Kessler, 530 F.2d 1246, 1253-58 (5 Cir. 1976), the prosecution intentionally introduced a prejudicial false exhibit, and the defendant successfully moved for mistrial. The court acknowledged that under Dinitz retrial was normally permissible when trial ends on the defendant's motion. But the court found that "[w]here 'prosecutorial overreaching'

is present, the interests protected by the Double Jeopardy Clause outweigh the public interest in conducting a second trial ending in acquittal or conviction." Id. at 1255-56. The court continued: "To find 'prosecutorial overreaching,' the Government must have, through 'gross negligence or intentional misconduct,' caused aggravated circumstances to develop which 'seriously prejudice[d] a defendant' causing him to 'reasonably conclude that a continuation of the tainted proceeding would result in a conviction.'" Id. at 1256. Based on this double jeopardy analysis, the court held that the Double Jeopardy Clause forbade the defendant's retrial, even though he had moved for mistrial. See also United States v. Weaver, 565 F.2d 129, 133 (8 Cir. 1977), cert. denied, 434 U.S. 1074 (1978).

The Tenth Circuit, by contrast, has narrowly interpreted the language of Dinitz. In United States v. Nelson, 582 F.2d 1246 (10 Cir. 1978), cert. denied, 439 U.S. 1079 (1979), the prosecutor intentionally induced a DEA agent to testify that the defendant was a "major trafficker" in drugs, and the defendant moved for a mistrial which was granted. The district judge characterized the testimony as being as "reprehensible as any he had ever heard." Id. at 1248. Nevertheless, the Tenth Circuit held that the Double Jeopardy Clause did not bar retrial.

The court followed an opinion by Mr. Justice Rehnquist sitting as a circuit justice in which the Justice permitted retrial where the defendant failed to show that the trial mistake "was committed by the prosecution or by the court for the purpose of forcing the defendant to move for a mistrial." Id. at 1249 (quoting Divans v. California, 434 U.S. 1303 (1977)). The Tenth Circuit concluded that the defendant must show that "the objectionable testimony . . . was the product of a governmental scheme intentionally calculated to trigger the declaration of a mistrial." 582 F.2d at 1249. Finding no such proof, the court saw no constitutional bar to the defendant's second trial.

I am persuaded that the approach of the Fifth Circuit is the better view. Dinitz did recognize that at least one form of prosecutorial misbehavior would foreclose retrial. Dinitz did not discuss the situation presented here: extreme and deliberate governmental misconduct short of an intentionally stimulated mistrial. Gross governmental misbehavior is drastically different from mere prosecutorial or judicial error. Dinitz contains language which supports the Fifth Circuit's distinction between mere error and "prosecutorial overreaching:"

> [W]here circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prose-

cutorial or judicial error.

424 U.S. at 607 (quoting United States v. Jorn, 400 U.S. 470, 485 (1971)) (emphasis added). Justice Rehnquist's opinion does not directly discuss egregious governmental misdeeds, although it admittedly supports the government's position; in any case, it does not necessarily follow that the views of a single justice represent the views of a majority of the Court.

Moreover, the Fifth Circuit decision is more faithful to the policies behind the Double Jeopardy Clause. A second trial subjects a defendant to the anxiety and expense which accompanies multiple prosecutions. The Double Jeopardy Clause protects a defendant from this burden except where the societal interest in "fair trials ending in just judgments" outweighs the defendant's interests. United States v. Kessler, 530 F.2d 1246, 1258 (5 Cir. 1976). When trial is brought to an end by egregious and deliberate misconduct of a government agent, the public interest in fair trials may not be served by retrial. If the prosecution has the chance to try its case more than once, its case becomes stronger through rehearsal and the likelihood of convicting an innocent defendant increases. Witnesses become more expert at relating their stories and more adept at fending off cross-examination. This case illustrates that double jeopardy concern. During

the first trial, defense counsel was able to turn Dixon's testimony to his client's advantage. At a second trial, Dixon may well be more careful in his comments and make defense counsel's task more difficult.

In addition, if the Tenth Circuit approach is adopted, it will be difficult to protect defendants even from intentionally stimulated mistrials. It is nearly impossible, as a practical matter, to prove what a prosecutor or government agent was thinking when he caused a mistrial. In almost every case, only malicious conduct will be apparent on the record. In this case, for instance, it may well be that Dixon, an experienced drug enforcement agent, knew that a mistrial would probably result from his reference to Green's prior criminal record. Rather than merely trying to put another nail in defendant's coffin so as to offset his own damaging admissions, Dixon may well have wanted to end trial so that he could get off the stand and have a second shot at testifying. He was unfortunately not interrogated about his motives, but in any event, no one can delve into his inner thoughts. These possibilities and the difficulty of proof persuade me that the prophylactic effect of the Fifth Circuit's interpretation of Dinitz is the one we should follow.

In concluding that retrial of this defendant should be forbidden, I am fully aware of the public interest in the prevention, punishment and deterrence of crime. These are important considerations. Of equal, if not greater, importance is the principle that the government must deal fairly with those who are governed. The breach of fairness in this case, by one whose role was such a principal part of this prosecution, was so egregious that I would not permit defendant to be tried anew.

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80-6039

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA	*	
Respondent	*	
vs.	*	NO.
ROBERT LEE GREEN, a/k/a HOPE	*	
Petitioner	*	

* * * * * *** * * * * *

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Robert Lee Green, a/k/a Hope, by Leslie L. Gladstone, his attorney, hereby moves that this Honorable Court grant leave to proceed in forma pauperis to file Writ of Certiorari, and states in support thereof:

1. That he is unable to afford the cost of printing the Writ of Certiorari and Appendix, as required by Supreme Court Rule 39, and costs for filing said Petition, as said costs pose a great financial burden.

2. That he was granted leave to proceed in forma pauperis by the United States District Court for the District of Maryland.

3. That defense counsel was appointed under the Criminal Justice Act of 1964 by the United States District Court for the District of Maryland on November 20, 1978.

4. That counsel was appointed under the Criminal Justice Act of 1964 by the United States Court of Appeals, Fourth Circuit for purposes of appeal on May 29, 1979.

LESLIE L. GLADSTONE
ATTORNEY AT LAW
ONE EAST REDWOOD ST
SUITE 400
BALTIMORE, MD. 21202
(301) 539-0905
(301) 727-2322

WHEREFORE, Petitioner requests that he be granted leave to proceed in forma pauperis and that the requirements of printing and the costs for filing said Petition for Writ of Certiorari and Appendix be waived.

Leslie L. Gladstone
Suite 400
One East Redwood Street
Baltimore, Maryland 21202
(3010 539-0605

Attorney for Petitioner

LESLIE L. GLADSTONE
ATTORNEY AT LAW
ONE EAST REDWOOD ST
SUITE 400
BALTIMORE, MD. 21202
(301) 539-0605
(301) 727-2322